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News Gathering From Space: Land Remote-Sensing and the First Amendment

Rita A. Reimer*

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INTRODUCTION

What does the closed Soviet city of Gorki look like, or Kharq Island or the hijacked Achille Lauro cruise ship? Did an Afghan village really burn down?[1]

* B.A. University of Delaware 1969, J.D. George Washington University 1974, M.A.L.S. Georgetown University 1981. Currently a Legislative Attorney, American Law Division, Congressional Research Service, Library of Congress. The views expressed herein are solely those of the author and do not necessarily reflect the views of the Library of Congress.

1. Mauro, *The Puzzling Problems of Pictures from Space*, 8 WASH. JOURNALISM REV. 15, 15 (1986).

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The answers to these and similar questions may already be available to the United States and Soviet governments, if atmospheric conditions are right and a land remote-sensing satellite is in the vicinity. However, the American public generally does not have access to this type of information.

The media in this country would like to change this situation, ideally by launching their own land remote-sensing satellites (mediasats) as authorized by the Land Remote-Sensing Commercialization Act of 1984.[2] However, the media is reluctant to invest the resources required to take this step without assurances from the federal government that they will be allowed to make widespread use of the images generated by these satellites. The government is reluctant to give these assurances because it fears that doing so could jeopardize vital national security interests.

The National Oceanographic and Atmospheric Administration (NOAA) recently issued final regulations governing licensing of those who wish to launch these satellites and have access to the images they provide.[3] These regulations employ very general language in discussing when such licensing or access will be denied. Comments on these regulations indicate that the media perceive a constitutional right to access to these materials—a right which can be restricted only in highly-circumscribed situations. The media would like to have these situations made clear in advance, so that they can decide whether it would be economically feasible to launch a mediasat.[4] The government, however, believes that its national security interests justify a more extensive ban and argues that only general language is appropriate in drafting these regulations because of the impossibility of predicting in advance the precise types of sensitive situations which may justify restrictions on dissemination. As noted, NOAA has adopted the general language favored by the government, although not for the reasons it requested.

2. 15 U.S.C. §§ 4201–4292 (Supp. III 1985). The Act also authorizes private use of civilian United States government satellites on a space-available basis.

3. 52 Fed. Reg. 25970–74 (1987) (to be codified at 15 C.F.R. § 960).

4. American Enterprise Institute's Open Discussion on Satellite Remote-Sensing as a Tool for News Gathering 27 (Apr. 8, 1987) (remarks of C. Lewis) (available from American Enterprise Institute) [hereinafter AEI Transcript]. Mr. Lewis is an Associated Press Bureau Chief.

I. LAND REMOTE-SENSING: THE OBSTACLES OF TECHNOLOGY AND COST

Land remote-sensing is premised on the fact that all matter on earth radiates or reflects electromagnetic radiation. Scanners aboard remote-sensing satellites detect and measure this energy and relay their readings to ground stations which transform them into computer images.[5]

There are two primary commercial sources for land remote-sensed pictures: The American Earth Observing Satellite Company (EOSAT), formerly the United States Government's Landsat, and the French System Probatiore d'Observation de la Terre (SPOT). In addition, the Japanese and the Soviets have recently launched satellites which can be utilized for this purpose. However, only a small percentage of the images produced by these satellites are useful for media purposes at the present time.

Each satellite (Landsats 4[6] and 5 and SPOT) travels in a near-polar orbit—the Landsats at a height of 706 kilometers and SPOT at 832 kilometers—and takes approximately 100 minutes to circle the globe.[7] Because the earth rotates and the satellites travel pole-to-pole, they fly over different parts of the earth on each orbit. It takes sixteen days for each Landsat to cover the same area on the equator, and eight days at the poles. SPOT repeats its orbit once every twenty-six days, although its sensor can be aimed so that it covers the same territory seven of these days.

Even if a satellite is properly positioned, this does not ensure that it will provide acceptable images. In some parts of the world, the earth's surface is obscured by clouds for weeks or even months at a time.[8] Storms, smog, haze, and other temporary atmospheric conditions can similarly render even well-aimed images unacceptable.

5. OFFICE OF TECHNOLOGY ASSESSMENT, COMMERCIAL NEWS GATHERING FROM SPACE—A TECHNICAL MEMORANDUM 8–11 (1987) [hereinafter OTA MEMORANDUM]. The terms "images" and "photographs" are frequently used interchangeably when discussing material provided by remote-sensing, although little of what is retrieved today consists of photographs in the traditional sense.

6. Landsat 4 failed only a few weeks after launch and now works only sporadically. Manber, *Running Landsat into the Ground*, 24 ACROSS THE BOARD 40, 43 (June 1987). For a chronology of the Landsat program, see *infra* note 23.

7. *See* OTA MEMORANDUM, *supra* note 5, at 13.

8. *Id.*

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In addition, the images provided may not include sufficient detail to make their purchase by the media worthwhile. The detail provided is discussed in terms of resolution, which refers to the size of objects distinguishable in the image. This resolution can be manipulated from the ground. Ten meter resolution means that the viewer will be able to discern objects which are ten meters or larger in size. To date, the best commercially-available resolution is the Russian satellite's five meter resolution,[9] although SPOT's ten meter resolution is the most widely utilized.[10] However, some United States military satellites reputedly have a resolution of a few inches—enough to discern what newspaper a person is reading in his or her back yard, if not precisely what words are being read.[11]

The media has indicated that it considers a three to five meter resolution optimal for its purposes.[12] However, SPOT is now concentrating on the coarser resolutions preferred by the agribusiness, forestry, and energy industries, because the media market for its images has not been large, and it believes its economic interests would be best protected by concentrating on these other markets.[13] Further complicating this situation is an alleged national security directive which limits civilian land-remote sensing satellites to ten meter resolution.[14] However, short of a series of international agreements, there may be little the government can do to prevent the use of smaller resolution images obtained from foreign sources. It might therefore consider amending or repealing this directive should it hurt the marketability of U.S. satellite images.

9. N.Y. Times, Sept. 27, 1987, § 1, at 40, col. 1.

10. OTA MEMORANDUM, *supra* note 5, at 12. SPOT is capable of ten meter resolution in black and white and twenty meter resolution in color. Landsat's best resolution is thirty meters. *Id.* at 2.

11. *News Gathering Goes into Orbit*, INSIGHT, Sept. 8, 1986, at 59, 60.

12. AEI Transcript, *supra* note 4, at 27 (remarks of C. Lewis).

13. AEI Transcript, *supra* note 4, at 22 (remarks of D. Julyan). Mr. Julyan is Vice-President of Sales and Marketing, SPOT Image Corporation.

14. The existence of this directive has been widely reported, but it is difficult to verify either its existence or its terms. Both SPOT and EOSAT officials have denied knowledge of its terms. *News Gathering Goes into Orbit*, *supra* note 11, at 60. Wally Henderson, a former Pentagon employee who is now a private consultant, stated at an American Enterprise Institute open discussion that such a directive exists, and dates back to the Carter Administration. He stated that he had seen the directive, but refused to confirm or deny the ten meter limitation. AEI Transcript, *supra* note 4, at 19.

Finally, satellite images are only useful if they are properly interpreted. For example, although remote-sensed images were available and widely used in connection with the Chernobyl nuclear disaster (thus for the first time alerting the media and public alike to the exciting possibilities of this technology), two of the major networks incorrectly stated that the images indicated that two reactors (rather than one) were involved in the disaster. Also, the Italian city of Trieste was incorrectly identified as Chernobyl.[15]

The preceding discussion applies only to remote-sensed images which are developed and distributed. As a practical matter, only a small percentage of all the material collected is turned into pictures, and not all of this is done immediately upon receipt. In addition, much of the material is gathered through foreign ground stations in countries whose governments may delay or deny the desired access far longer than the six to eight hours considered optimum by the media. Thus, the rapid data delivery from the space satellite to the media necessary for timely media use is simply not available at the present time.[16]

All of these factors make it unlikely that a particular mediasat image will pose national security problems. In fact, a Department of Defense consultant with lengthy military and defense intelligence experience has stated that, because of the timing and resolution factors discussed above, the Department of Defense has no present problems with the concept, but remains concerned about future developments as the applicable technologies become increasingly advanced.[17] There is evidence, however, that some images already have the potential for generating such concern. For example, it has been alleged that a United States installation off the coast of Washington State, Thule, violates the Anti-Ballistic Missile Treaty. The broadcast media has indicated that it would be interested in remote-sensed images of

15. Brugioni, *Satellite Images on TV: The Camera Can Lie*, Wash. Post, Dec. 14, 1986, at H1, col. 1, H2, col. 1.

16. OTA MEMORANDUM, *supra* note 5, at 2. This situation is magnified if the material sought is noncurrent. An EOSAT spokesperson has stated that past material can be retrieved in a week if it has been processed, but not for four to five weeks if it has not been processed. *Id.* at 18.

17. Maj. Gen. Jack E. Thomas (USAF, ret.), Remarks before the Association of the Bar of the City of New York (Dec. 9, 1986) [hereinafter Remarks on Remote Sensing].

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this facility, if any become available.[18]

There is yet another obstacle facing the media: the cost of a mediasat system. The Office of Technology Assessment (OTA) has estimated that a fully operational system would cost between $215 and $470 million, with an additional $10 to $15 million needed for operating costs for each of the five years the system is designed to operate—an average yearly expenditure over this five year period of between $53 and $109 million. Even assuming that the three major networks as well as the Cable News Network use one satellite image daily over the course of the year, this still results in an average cost of between $35,000 and $73,000 per image, as opposed to the less than $5000 per network news story which is spent at the present time.[19] For this reason, OTA anticipates that substantial government subsidies will be required to operate any mediasat system in the near future.[20]

The future of Landsat/EOSAT is also highly uncertain because of Office of Management and Budget (OMB) decisions relative to its funding. Under the terms of the EOSAT contract, the Department of Commerce is to spend $250 million to build two more satellites and a ground receiving station. However, OMB decided in late 1985 that the government could not afford anything greater than the $90 million already appropriated for that purpose and declined to request additional funding for the fiscal year 1987 budget. Negotiations between Congress, OMB, EOSAT, and private entities which might be interested in funding one mediasat (two are believed necessary for a comprehensive system) are ongoing, but at the moment the outcome is uncertain despite charges that failure to release the additional funding not only constitutes a breach of contract, but also seriously jeopardizes the United States's chances to remain competitive in this area of great importance.[21]

18. AEI Transcript, *supra* note 4, at 24–25 (remarks of M. Brender and P. Sharfman). Mr. Brender is the Assignment Editor of ABC News and Chair of the Radio-Television News Directors Association Space Committee. Mr. Sharfman is an OTA official.

19. OTA MEMORANDUM, *supra* note 5, at 4, 25.

20. *Id.* at 6–7. Some members of the media dispute this, arguing that technological advances will both decrease costs and increase the marketability of images produced. They also note that the cost of the system is roughly comparable to that of broadcasting the Olympic games. *Id.* at 24; AEI Transcript, *supra* note 4, at 18 (remarks of P. Zimmerman). Mr. Zimmerman is a Senior Associate, Carnegie Endowment for International Peace.

On the other hand, networks bid for Olympic coverage based primarily on anticipated revenues from the sale of advertising time, so it is difficult to make the correlation between Olympic broadcasts and mediasat in this context. Also, it may be difficult to attract investors for mediasat without some guarantee that it will produce useful images. *Id.*

II. THE LAND REMOTE-SENSING COMMERCIALIZATION ACT OF 1984

This funding controversy has arisen within the framework of the Land Remote-Sensing Commercialization Act of 1984,[22] sometimes known as the "Landsat Act," which was enacted to ease the transition from government to private ownership of the United States's remote-sensing program. The Act established a framework for all interested parties who would like to launch their own remote-sensing satellites and/or otherwise participate in these endeavors. This new system is intended to replace the original Landsat system, which has been in operation since 1969.[23]

The Landsat Act, its legislative history, and its implementing regulations all refer to national security concerns in general terms and thus provide little guidance as to how particular situations might be handled. The Act's listing of congressional findings includes a statement that "land remote sensing by the Government or private parties of the United States affects international commitments and policies and national security concerns of the United States";[24] and its declaration of purposes

21. Matlack, *Landsat's Slow Death*, 30 NAT'L. J. 1903, 1904 (1987). Since the United States Government is presently Landsat's largest customer (the Department of Defense purchases an estimated $10 million annually; USDA, $4 million; and NASA and the Interior Department, $500,000 each), it would have to go elsewhere to obtain this data should EOSAT go under. This has led to calls for subsidies from these users' budgets. *Id.*

22. 15 U.S.C. §§ 4201–4292 (Supp. III 1985).

23. The Landsat program was inaugurated in September 1969, with the first satellite, Landsat 1, launched in July 1972. Then known as the Earth Resources Technology Satellite, or ERTS, its name was changed to reflect its concentration on land, as opposed to the oceans or the atmosphere. The system was developed by the National Aeronautics and Space Administration, which operated it as an experimental satellite system until it was transferred to the National Oceanic and Atmospheric Administration, an agency located within the Department of Commerce, in 1979. S. REP. NO. 458, 98th Cong., 2d Sess. 1–2 (1984); Joyner & Miller, *Selling Satellites: The Commercialization of Landsat*, 26 HARV. INT'L L.J. 63 (1985).

24. 15 U.S.C. § 4201(4) (Supp. III 1985).

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cites as one purpose to "maintain the United States's worldwide leadership in civil remote sensing, preserve its national security, and fulfill its international obligations."[25] The pertinent regulations require license applicants to submit with their application "[a]dequate operational information regarding the applicant's remote-sensing space system on which to base review to ensure compliance with national security and international requirements. . . ."[26] The EOSAT contract similarly provides that the company shall comply with all national security directives.[27]

Under the Act, the Secretary of Commerce is to consult with the Secretary of Defense on all matters affecting national security,[28] and with the Secretary of State on all matters affecting international obligations.[29] Those secretaries are to determine which conditions come within their respective areas of concern, and notify the Secretary of Commerce promptly of any such conditions. No additional information is provided to limit or clarify what is covered by this broad language.

The Act's legislative history[30] is silent as to what treatment media entities are to receive should they apply for remote-sensing licenses. Congressional staffers and government attorneys

25. 15 U.S.C. § 4202(2) (Supp. III 1985).

26. 52 Fed. Reg. 25,971 (1987) (to be codified at 15 C.F.R. § 960.6(d)). Specific information, both technological and on the planned use and dissemination of the information which is received, must be included with the application to help the licensing agency make its determination. *Id.* In contrast, the Department of Transportation regulations implementing the Commercial Space Launch Act of 1985 (49 U.S.C. §§ 2601–2623 (Supp. III 1985)), which govern launch activities, specify that launch authority will be withheld on national security or foreign policy grounds only if there is "clear evidence" that the launch would threaten "distinct U.S. national security or foreign policy interests" or would be "inconsistent with international obligations of the United States" (14 C.F.R. § 411.7 (1987)). The media is much more comfortable with this language. *See* Comments of Radio-Television News Directors Association. Before the Department of Commerce in the Matter of the Licensing of Private Remote Sensing Space Systems, No. 51191-5191 (May 23, 1986), at 8–10 [hereinafter RTNDA Statement].

27. *Landsat Commercialization: Hearing Before the Subcomm. on Natural Resources, Agriculture Research and Environment and the Subcomm. on Space Science and Application of the House Comm. on Science and Technology*, 99th Cong., 1st Sess. 10 (1985). The EOSAT contract is summarized *id.* at 56–58; its text is not provided.

28. 15 U.S.C. § 4277(a) (Supp. III 1985).

29. *Id.*

30. H.R. REP. No. 647, 98th Cong., 2d Sess. (1984); S. REP. No. 458, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 658; 130 CONG. REC. S6853–59 (daily ed. June 8, 1984); 130 CONG. REC. H2467–77 (daily ed. Apr. 9, 1984).

who were involved in drafting this legislation have stated that the possibility of news gathering from space, with its concomitant constitutional questions, did not occur to them at that time.[31]

When the proposed regulations were issued, the National Environmental Satellite, Data, and Information Service noted that some prospective applicants might want greater certainty as to when a license might be denied or conditions imposed to protect national security or foreign policy interests. However, the Service explained that this was not feasible since "individual judgments [will be] made in context affected by rapidly changing technology and [therefore] must be made on a case-by-case basis."[32] The proposed regulations were subsequently adopted unchanged, despite their general language on this matter.

III. FIRST AMENDMENT CONCERNS

A. *The Constitutional Status of News Gathering*

Although the Supreme Court has indicated that news gathering activities are entitled to constitutional protection, the Court has not ruled that such protection is as broad as that afforded traditional speaking and publishing activities. In *Branzburg v. Hayes*,[33] the Court required certain journalists to testify before grand juries about sources who had been promised anonymity in exchange for providing information on alleged criminal activities. The Court said its ruling was not intended to suggest "that news gathering does not qualify for First Amendment protection," noting that, "without some protection for seeking out the news, freedom of the press could be eviscerated."[34] However, the only Supreme Court cases that have directly addressed the issue of news gathering involved media access to prison inmates.

The cases are companion 1974 decisions, *Pell v. Procunier*[35] and *Saxbe v. Washington Post Co.*,[36] which challenged regulations prohibiting press and other media interviews with individ-

31. Peterzell, *Eye in the Sky*, COLUM. JOURNALISM REV., Sept.–Oct. 1987, at 46.

32. 51 Fed. Reg. 9971, 9973 (1986).

33. 408 U.S. 665 (1972).

34. *Id.* at 681.

35. 417 U.S. 817 (1974).

36. 417 U.S. 843 (1974).

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ual prisoners.[37] In these cases, the press argued that it had a constitutional right to interview any willing inmate, and that such a right could be abridged only if prison authorities made individualized determinations that interviewing particular inmates would constitute a clear and present danger to prison security or other substantial interest of the prison system. In rejecting this argument, the Court explained:

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.[38]

In *Pell v. Procunier* the Court cited with approval the following statement from *Zemel v. Rusk*,[39] a 1965 case which permitted the State Department to refuse to issue passports for travel to Cuba under specified circumstances:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[40]

37. *Pell* involved a challenge to § 415.071 of the California Department of Corrections manual, which stated that "[p]ress and other media interviews with specific individual inmates will not be permitted." *Saxbe* challenged ¶ 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

38. 417 U.S. at 834–35 (citations omitted).
39. 381 U.S. 1 (1965).
40. 417 U.S. at 834 n.9 (quoting Zemel v. Rusk, 381 U.S. at 16–17).

Pell v. Procunier and *Saxbe v. Washington Post Co.* were affirmed four years later in *Houchins v. KQED*,[41] a 3–1–3 split decision which upheld a sheriff's decision not to allow the press to inspect, photograph, or interview inmates at a county jail where conditions had allegedly caused numerous problems, including an inmate's suicide. However, Justice Stewart, who wrote the decisive concurrence, indicated that in his view the press should at times be given preferential treatment over the general public, including under the circumstances presented in the case, but not to the extent the press desired.[42] The three-Justice majority[43] reiterated its support for the *Pell* and *Saxbe* holdings, while the dissenters[44] argued that those cases should be distinguished because they involved situations in which the press had been allowed substantial access, whereas in *Houchins* they had been given none at all.

None of these cases is directly analogous to the Landsat situation where, not the general public, but various companies and organizations are likely to in time launch land remote-sensing satellites or seek to utilize government civilian satellites on a space-available basis. Denying the media's requests to undertake such activities would clearly run counter to these cases if non-media license applicants were not similarly denied access.

Even if these cases did not exist, it would be difficult to deny the press access to materials collected by other users. The Act requires all unenhanced remote-sensing data to be made available to all potential users on a nondiscriminatory basis.[45] There is no rational justification, constitutional or otherwise, for imposing the additional obstacle on the media of acquiring this material from other users. Even if the First Amendment does not grant media applicants priority over non-media applicants, it at least provides for equal treatment. Thus, denying the media authority either to launch or to utilize land remote-sensing satellites or to utilize the material which such satellites generate would violate what little pertinent Supreme Court case law presently exists in this area.

41. 438 U.S. 1 (1978).
42. *Id.* at 16–19 (Stewart, J., concurring).
43. Chief Justice Burger and Justices White and Rehnquist.
44. Justices Stevens, Brennan, and Powell.
45. 15 U.S.C. §§ 4201(5), 4203(b), 4212(a)(3) (Supp. III 1985).

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B. *The Doctrine of Prior Restraint*

Assuming that some access by the media is granted to land remote-sensed images—as Congress intended in enacting the Landsat Act—what conditions can be placed on access to and/or use of particularly sensitive material? This situation is governed by the doctrine of "prior restraint," which holds that, except in extraordinary situations, any procedure used to suppress protected speech must rely on a post-publication "subsequent sanction," rather than a pre-publication prior restraint. For purposes of land remote-sensing, any such restraint is likely to be based on national security considerations.

To date, the only case which authorized a prior restraint on publication on national security grounds is a federal district court decision which prohibited a magazine from publishing an article explaining in detail how to construct a hydrogen bomb.[46] However, there is dicta in two Supreme Court cases which gives some idea of the standards which are likely to be applied in determining whether such restrictions are appropriate.

One of these cases, the 1931 decision *Near v. Minnesota*,[47] had nothing to do with national security, but rather involved an injunction authorized by a Minnesota law which barred publication of any printed material adjudged to be a public nuisance. The magazine in question had printed allegedly defamatory and clearly anti-Semitic articles about various public officials, the local grand jury, and others who were supposedly involved in gambling, bootlegging, and racketeering activities in Minneapolis. The Court, noting the almost entire absence of attempts to impose prior restraints upon publications relating to the malfeasance of public officials,[48] stressed that subsequent sanctions (in this case, defamation suits) rather than prior restraints were appropriate in such cases:

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is

46. United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed,* 610 F.2d 819 (7th Cir. 1979).

47. 283 U.S. 697 (1931).

48. *Id.* at 718. The focus of the discussion is that it is especially important that the character and conduct of public officers remain open to debate and free discussion in the press. *Id.* at 718–19.

> the appropriate remedy, consistent with constitutional privilege.[49]

As for national security cases, the Court said that, in times of war, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[50] This remains the only pronouncement in an opinion by the Supreme Court of the standard to be applied during times of war.[51] It must be updated, of course, to affect those activities which today are comparable to providing "the sailing dates of transports and the number and location of troops" in 1931.[52]

The most famous prior restraint case in the context of national security is that involving the so-called "Pentagon Papers," *New York Times Co. v. United States*.[53] These papers came from a classified Pentagon study officially entitled "History of U.S. Decision Making Process in Vietnam," which described the origins of American involvement in the Vietnam War. The challenged material had already been well circulated and all of it was at least three years old.

The government originally sought to have publication barred under section 793 of the Espionage Act,[54] which prohibits gathering, transmitting, or losing defense information. When this law was held inapplicable, the government argued that "inherent constitutional powers" to safeguard national security existed which justified an injunction prohibiting further publication.

The case was scheduled and heard extremely quickly and the decision, a 6–3 ruling upholding the right to publish, was

49. *Id.* at 716.

50. *Id.* (footnote omitted).

51. Several Justices of the Court have discussed such a standard in concurring opinions. *See, e.g., infra* notes 55–56 and accompanying text.

52. Following *Near*, the Court emphasized in a variety of other contexts that prior restraints will not be upheld unless they can be shown to advance significant government interests and that no lesser restrictions would have this same effect. In recent years the issue has arisen most frequently in "free press/fair trial" cases, in which courts must balance a defendant's Sixth Amendment right to a fair trial against protected First Amendment rights. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

53. 403 U.S. 713 (1971).

54. 18 U.S.C. § 793 (1982).

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announced in a brief per curiam opinion. Each Justice then elaborated on his views in a separate concurring or dissenting opinion.

Of the six Justices who supported the right to publish, both Justices Black and Douglas stated the view that prior restraints were never constitutionally permissible. Justice Brennan stated that he would support a prior restraint to the extent described in *Near*, but added that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."[55] Justice Stewart, joined by Justice White, said that, in the absence of an applicable statute, he would permit prior restraints on publication only if necessary to prevent "direct, immediate and irreparable damage to our Nation or its people."[56] This statement is the closest the Court has come to announcing a present standard in this area. Finally, Justice Marshall found prior restraint inappropriate in this case because it had not been authorized by Congress.[57]

In addition, the basis for the dissenting opinions of Chief Justice Burger and Justices Harlan and Blackmun was primarily the haste with which the case was heard. They did not argue that the papers should never be released, but only that an injunction was appropriate until such time as the government was able to present its case in a full adversarial hearing.

The only case which has upheld a prior restraint on national security grounds is the 1979 decision by the United States District Court for the Western District of Wisconsin referred to earlier, *United States v. The Progressive, Inc.*[58] That court issued an injunction against a magazine which was planning to publish an article providing detailed information about how to build a hydrogen bomb.

The government did not claim that the author of the article had wrongfully obtained or utilized classified information, as most of his research was done in freely-accessible government libraries. Rather, it claimed that he had put together unclassified information in a way which had never been done before—

55. 403 U.S. at 725–26 (Brennan, J., concurring).
56. *Id.* at 730 (Stewart, J., concurring).
57. *Id.* at 742 (Marshall, J., concurring).
58. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

one which violated a provision of the Atomic Energy Act prohibiting the communication of restricted data that may be "utilized to injure the United States or to secure an advantage to any foreign nation."[59]

In reaching its decision, the *Progressive* court relied primarily on the *Pentagon Papers* case, noting that several of the Justices who denied the desired injunction stated that they might be more favorably inclined towards the government's position if there was a specific statute which barred the challenged publication, as was true of the *Progressive* article. The court also held that the government had met the standard set forth in the *Pentagon Papers* case by Justices Stewart and White, inasmuch as the publication could result in "grave, direct, immediate and irreparable harm to the United States."[60]

This latter point was true even though the court found that the article actually did *not* provide a "do-it-yourself" guide for building a hydrogen bomb—a complicated procedure under the best of circumstances, and one which involves difficult-to-obtain materials such as plutonium. However, the court said that the article contained sufficient information to allow a medium-sized nation to move faster in developing a hydrogen weapon, both by providing the basic blueprint and by helping that nation bypass stumbling blocks such as the year-long delay encountered by French physicists in the 1930s because they were not aware of the chain reaction process. Such delays can prove significant, as for example when Hitler failed to get his V-1 and V-2 bombs operational quickly enough to materially affect the outcome of World War II. Thus, under this reasoning, the "immediate" harm can be some years off if potential nuclear devastation is involved.

However, the bottom line for the court was the irreparable damage that could be done by an incorrect ruling:

> [O]ne cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys freedom to live.
>
> Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe

59. 42 U.S.C. § 2274 (1982).
60. United States v. The Progressive, Inc., 467 F. Supp. 990, 996 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

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and function as they work to achieve perfect freedom of expression.[61]

The article enjoined in this case was subsequently printed in other publications, rendering the district court's injunction moot. The Department of Justice subsequently declined to prosecute those responsible for its reproduction.

The most recent challenge to a prior restraint on national security grounds arose in connection with the total news blackout of the 1981 invasion of Grenada. Media representatives were prohibited from accompanying the invasion forces in the initial landings on that island, and members of the press who attempted to travel independently to the island were prevented from reporting news of the invasion. The ban was not lifted until several days after the island had been secured and most of the fighting had ended.

After the invasion was over, the press challenged the ban in court and sought a permanent injunction against any such bans in the future. However, their challenge was dismissed as moot by the United States District Court for the District of Columbia in *Flynt v. Weinberger*.[62] That court held that the plaintiffs had not demonstrated that the controversy was "capable of repetition, yet evading review" as required under *Weinstein v. Bradford*[63] to vitiate the mootness issue. Also, the government had ceased the challenged conduct, giving the press unlimited access to Grenada for some time before the suit was filed. The court explained:

> The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not likely to be repeated. In addition, it required a discretionary decision by the President of the United States as Commander-in-Chief to commit United States forces. The decision to impose a temporary press ban was also a discretionary one. It was made by the military commander in the field of operations because the safety of press representatives could not be guaranteed and in order to ensure that secrecy was maintained, thereby protecting the safety of United States troops and promoting the success of the military operation.[64]

61. *Id.* at 995.
62. 588 F. Supp. 57 (D. D.C. 1984).
63. *Id.* at 59 (citing 423 U.S. 147, 148 (1975)). The *Flynt* court noted that the Supreme Court has required not merely a "physical or theoretical possibility" (Murphy v. Hunt, 455 U.S. 478, 482 (1982)), but a "demonstrated probability" that the challenged conduct will recur (*Weinstein*, 423 U.S. at 149). The court in *Flynt* held that such a probability did not exist.

Thus, the underlying rationale for this decision was the discretionary authority of the President as Commander-in-Chief and of military field commanders to conduct military operations as they thought best. In this regard, the court stated that issuing a permanent injunction against future press bans of this nature "would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest."[65] In sum:

> The decision whether or not to impose a press ban during military operations and the nature and extent of such a ban if imposed are matters that necessarily must be left to the discretion of the commander in the field. . . . A decision whether or not to impose a press ban is one that depends on the degree of secrecy required, force size, the equipment involved, and the geography of the field of operations. Moreover, the scope of press exclusion, if any, will differ somewhat in every case. Under such circumstances . . . a declaratory judgment would be futile, and perhaps even dangerous, because of its limited value as a guide for future conduct.[66]

The United States Court of Appeals for the District of Columbia Circuit affirmed *Flynt* solely on the question of mootness.[67] However, Judge Edwards, in a brief concurrence which made note of allegations that the press had been excluded not for national security reasons but to negate the possibility of unfavorable coverage of what some thought was an unnecessary military operation, stressed:

> In reaching this conclusion, we have had no occasion to consider whether it is unconstitutional for the government to ban the press from covering military actions where the sole or principal justification offered by the government is the safety of the press (and especially where an allegation is made that the government's actual motivation is to prevent unfavorable press coverage which might influence public opinion). I have no doubt that this question raises a potentially important issue of constitutional law.[68]

Following the Grenada invasion and the resulting controversy over press exclusion, the Department of Defense estab-

64. Flynt v. Weinberger, 588 F. Supp. 57, 59 (D. D.C. 1984).
65. *Id.* at 60.
66. *Id.* at 60–61.
67. Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985).
68. *Id.* at 136 (Edwards, J., concurring).

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lished the Sidle Commission (named for its Chairman, Maj. Gen. Winant Sidle (USA, Ret.)), to establish guidelines for the media/military relationship in future military operations. However, that commission declined to examine the legal aspects of this situation, explaining that, with regard to "so-called First Amendment rights":

> This is an extremely gray area and the panel felt that it was a matter for the legal profession and the courts and that we were not qualified to provide judgment. We felt justified in setting aside the issue, as we unanimously agreed at the outset that the U.S. media should cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces.[69]

While few would differ with the sentiments expressed in the final sentence, it contains nothing to help determine whether this standard has been met. Thus, it is likely that future cases of this nature, including those involving Landsat, will be resolved on a case-by-case basis under the reasoning discussed in *Flynt v. Weinberger*, the *Progressive* case, and the *Pentagon Papers* case. The result is that courts will not grant prior restraint unless they believe that national security interests are implicated.

C. *Subsequent Sanctions*

The fact that material can constitutionally be broadcast or printed does not mean that those responsible for its dissemination cannot later be sanctioned for having taken that action. The whole concept of prohibiting "prior restraints" encompasses the idea that "subsequent sanctions" may be appropriate and are in fact preferable to prior restraints in nearly all instances when it is possible to choose between these alternatives.

There are numerous federal laws which could be applied post-dissemination to the release, publication, or broadcasting of classified information where the doctrine of prior restraint precludes governmental prohibition of its dissemination. Specific prohibitions include those against gathering, transmitting, or losing defense information;[70] gathering or delivering defense information to aid a foreign government;[71] photographing defense

69. Undated letter from Maj. Gen. Winant Sidle (USA, Ret.) to Gen. John W. Vessey, Jr., Chairman, Joint Chiefs of Staff (circa 1984).
70. 18 U.S.C. § 793 (1982).
71. 18 U.S.C. § 794 (1982).

installations;[72] using aircraft for photographing defense installations;[73] publishing or selling photographs of defense installations;[74] and the disclosure of classified information.[75]

The "intent" component of these statutes varies widely. For example, 18 U.S.C. § 793, which prohibits gathering, transmitting, or losing defense information, applies only to those who take a prohibited action "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." The same standard is utilized in section 794: "Gathering or delivering defense information to aid foreign government." That section also prohibits the covered actions "in time of war, with intent that the same shall be communicated to the enemy." On the other hand, section 795 ("Photographing and sketching defense installations"), section 796 ("Use of aircraft for photographing defense installations"), and section 797 ("Publication and sale of photographs of defense installations") contain blanket prohibitions, regardless of intent. Since a single Landsat photograph can encompass 13,000 square miles,[76] it is difficult to envision any such photograph which does not include a covered installation. On the other hand, these laws were drafted before the possibility of a land remote-sensing satellite was envisioned, and it seems unlikely that an inadvertent photograph would be penalized absent some further action on the photographer/disseminator's part.

Several Justices writing in the *Pentagon Papers* case stated that, in their view, it would be appropriate to invoke these laws against those who published classified information. As Justice White explained in his concurring opinion:

> The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic

72. 18 U.S.C. § 795 (1982).
73. 18 U.S.C. § 796 (1982).
74. 18 U.S.C. § 797 (1982).
75. 18 U.S.C. § 798 (1982).
76. McGinley, *Satellites May Give Journalists Powerful Tool, Lead to Showdown on National Security Issue*, Wall St. J., July 2, 1986, § 2, at 58, col. 1.

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> systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.[77]

Justice Marshall similarly expressed the view that prosecutions under these laws would be acceptable if publications were found to have violated their prohibitions.[78] Even Justice Douglas, well-known for his absolutist view of the First Amendment, indicated that he might be persuaded to apply federal espionage laws to the press under carefully drawn circumstances, such as when Congress had actually declared war (Vietnam was an undeclared war).[79] Dissenting Chief Justice Burger and Justices Harlan and Blackmun supported the imposition of a prior restraint in the circumstances presented in the case.[80] Thus, it seems likely that they also would have supported post-publication sanctions against those publishing this material if it were found to violate federal espionage laws.

There are also federal laws outside the criminal code which could be utilized with regard to some land-remote sensing activities. For example, 50 U.S.C. § 783 (1976) prohibits the communication of classified information by a government officer or employee, or the receipt of classified information by a foreign agent or a member of a Communist organization. A provision of the Atomic Energy Act, 42 U.S.C. § 2274 (1976), the statute utilized in the *Progressive* case, prohibits the communication of restricted data which may be utilized to injure the United States or to secure an advantage to any foreign nation.

Again, it is difficult to generalize as to how these laws

77. 403 U.S. 713, 735–37 (1971) (White, J., concurring) (footnotes omitted). The government declined to prosecute those who subsequently published the material.

78. *Id.* at 745 (Marshall, J., concurring).

79. *Id.* at 720–22 (Douglas, J., concurring).

80. As discussed *supra*, in text following note 57, these Justices based their dissents in part on the time element involved (i.e., they indicated that they would issue a preliminary injunction until such time as the case could be fully argued), and thus might have ultimately agreed to the release of the information. However, the tenor of their opinions indicates a less expansive view of the First Amendment than those who upheld publication. *See, e.g.*, 403 U.S. at 750 (Burger, C.J., dissenting); *id.* at 754–55 (Harlan, J., dissenting).

would apply to particular Landsat activities. As already noted, many of the applicable laws require a specific intent to injure the United States, or at least knowledge that this is likely to happen as a result of the prohibited action. Even where no such intent is required, as in the prohibitions against photographing defense installations, there is clearly a distinction between deliberately photographing an airbase from the ground or perhaps from an airplane, and inadvertently including the base in a remote-sensed image that may cover hundreds of square miles. What if the person who captured or produced the image lacked the sophisticated equipment necessary to identify the installation, but sold it to someone who had the capacity to do so? The answer to this question and others like it are presently speculative.

IV. Other Considerations

A. *Privacy*

As is true in the national security context, material which is published or broadcast after being obtained through use of land remote-sensing techniques is treated the same as material obtained from other sources for purposes of determining if it is obscene, defamatory, or invasive of any individual's right to personal privacy. At this point, limitations on the level of resolution preclude commercial presentation of a legally obscene picture, and the possibility of a remote-sensed defamatory picture is also unlikely. However, invasion of privacy considerations deserve attention, both now and as future technological advances increase the possibility of such invasions.

To date, most of the cases involving aerial observation and the right to privacy implicate Fourth rather than First Amendment considerations. Most aerial reconnaissance is performed to further criminal investigations, and these cases discuss whether use of evidence obtained from warrantless overflights violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

The Supreme Court decided two aerial reconnaissance cases in May of 1986, *California v. Ciraolo*[81] and *Dow Chemical Co. v. United States*.[82] In each case the Court upheld a warrantless

81. 476 U.S. 207 (1986).

82. 476 U.S. 227 (1986).

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overflight by a 5-4 vote. In *Ciraolo*, the defendant was convicted of growing marijuana; in *Dow*, the defendant company's rights were held not to have been violated by the Environmental Protection Agency's overflights of its 2000-acre chemical plant after Dow refused to permit on-site inspection by that agency.

Under *Katz v. United States*, the standard to be applied in Fourth Amendment right of privacy cases is whether a person has a "constitutionally protected reasonable expectation of privacy."[83] *Ciraolo* is important because it held for the first time that this expectation does not necessarily exist within the curtilage of a residence—that is, the enfenced ground surrounding it. The Court said that the yard in this case, even though it was enclosed by a ten-foot fence, was not immune from view by a police officer, for example, who was riding on the top of a truck or a two-level bus.[84] Since it was not completely barred from public view, a warrantless aerial overflight did not violate the Fourth Amendment.

Ciraolo is thus an extension of the "open fields" doctrine, under which a person has no protection against searches of "open" property. However, even before that case was decided the definition of what was considered "open" for purposes of a warrantless search had been significantly expanded from the common law definition of that term. For example, in *Oliver v. United States*,[85] the Supreme Court upheld a warrantless ground search of a field located on a secluded 200-acre farm clearly posted with "No Trespassing" signs, fenced in with locked gates, and surrounded by woods, an embankment, and a river.

In *Dow*, the Court noted that "[i]t may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the general public, such as satellite technology, might be constitutionally proscribed absent a warrant."[86] It appears that no case presenting that particular situation has yet arisen.

However, the Court's reasoning in *Dow* would seem to apply even more strongly in a situation involving personal privacy, without any criminal overtones. The Second Restatement of

83. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
84. *Ciraolo*, 476 U.S. at 211.
85. 466 U.S. 170 (1984).
86. *Dow*, 476 U.S. at 238.

Torts defines the "unreasonable intrusion" component of the right of personal privacy as "intentional interference with [another's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns."[87] A person who appears in public is generally thought to have waived any right of personal privacy which might exist, so photographs taken under such circumstances do not ordinarily give rise to a privacy cause of action.[88] However, unauthorized photographs taken under conditions where the subject justifiably feels free from such intrusion have resulted in successful invasion of privacy lawsuits.[89]

It is unlikely that the present degree of commercially available resolution will give rise to an invasion of privacy action. Such lawsuits are a real possibility, however, if technological advances continue as anticipated. This adds great significance to reports that United States espionage satellites are capable of producing a four-inch resolution land remote-sensed image.[90] If such technology spreads and its availability becomes widely known and utilized, it may be that in time a person's back yard will no longer be considered "private." In the meantime, those making use of such images may find themselves defending invasion of privacy lawsuits should "intrusive" photographs reveal to the public facts which their subjects would prefer to keep private.

B. Scarcity

Since the Landsat Act authorizes the licensing of potentially unlimited numbers of private remote-sensing space systems,[91] it may eventually become necessary for the Department of Commerce to establish guidelines to determine which applications receive priority. This possibility is more likely, however,

87. RESTATEMENT (SECOND) OF TORTS § 652B comment a (1977).
88. *E.g.*, United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954); Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1953); Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963).
89. *E.g.*, Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971) (magazine acting in consort with police took pictures of plaintiff inside his home prior to his being charged with unauthorized practice of medicine); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) (picture of deformed infant taken in hospital without parents' consent); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942) (picture of patient in hospital bed).
90. Mauro, *supra* note 1, at 17.
91. 15 U.S.C. §§ 4241–4244 (Supp. III 1985).

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in the case of private applicants seeking satellites "on a space-available basis."[92] Depending on how much space is available at any given time, the Department may have to choose from among numerous qualified applicants to determine in which order they should be licensed to take advantage of this opportunity.

Any guidelines promulgated to assist in this determination, assuming that they are content-neutral and even-handedly applied, should pass constitutional muster. Even random selection from among all qualified applicants is a possibility, based on recent developments in the field of low power television (LPTV).[93] When Congress enacted the Communications Amendments Act of 1982,[94] it found that the large number of LPTV applicants would not permit the FCC to follow its usual approval process in a timely manner.[95] Congress therefore provided for a random selection process, or lottery, among all qualified applicants, with safeguards provided to ensure the desired diversity of ownership.[96]

This lottery system was accepted as constitutional, without discussion, by the United States Court of Appeals for the District of Columbia Circuit in *Salzer v. FCC.*[97] While it is unlikely that mediasat volume will be close to that in the LPTV situation, the same reasoning would apply should the number of applications significantly outnumber available allocations, or should there be a need for expedited review of the applications, or perhaps simply to ensure that no bias exists in the selection process. An added twist in the Landsat situation is that while all LPTV licensing applicants are broadcasters, Landsat applicants will likely include both media and non-media entities, such as oil, paper products, or agribusiness concerns.

This potential difficulty is at least partially mitigated by the Landsat Act's requirement that those participating in the program "make unenhanced data available to all potential users on a nondiscriminatory basis."[98] However, the media has argued that the system's potential usefulness will be lost if the media is not given at least some period of exclusive right to use of the information which it itself generates.[99] Granting an exclusive use period would pose no constitutional problem, but policy considerations might lead to restrictions on the types of material covered by such periods or the length of any such period. Moreover, the Landsat Act would have to be amended to accomplish this.

The Supreme Court has held on numerous occasions that the media can be subjected to nondiscriminatory legislation which has an economic impact, even though such impact leaves the media with fewer resources to do its job and may in fact cause a particular entity to shut down entirely. The key require-

92. 15 U.S.C. § 4245 (Supp. III 1985).

93. Low power stations broadcast in the gaps between transmission ranges of high power stations. Until 1982, they were permitted only to retransmit the signals of high power stations. In 1982, the FCC created a new service, authorizing LPTV licensees to originate their own programming. Report and Order in the Matter of an Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 47 Fed. Reg. 21,468 (1982), *on reconsideration*, 48 Fed. Reg. 21,478 (1983).

94. Communications Amendments Act of 1982, § 115, 47 U.S.C. § 309(i) (1982).

95. The Conference Report states:

> The Conferees . . . wish to emphasize as strongly as possible their firm intention and expectation that the Commission will use a lottery to expedite the processing of low power television service and translator facilities. Low power television and translator service is the ideal service for which to use a lottery, given the large number of licenses available, the large number of mutually exclusive applications for each license, the substantial backlog of applications on file with the Commission, the likelihood that the use of a lottery is essential to expediting the process of getting low power television service to the public, and the likelihood that bringing low power television service to the public quickly, through the use of a lottery, will result in a significant increase in the diversity of information sources available in many communities throughout the country.

H.R. REP. NO. 765, 97th Cong., 2d Sess. 38–39, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2282–83.

96. Certain applicants are given additional "chances," equivalent to additional lottery tickets. 47 U.S.C. § 309(i)(3)(A) (1982).

97. 778 F.2d 869 (D.C. Cir. 1985). *Salzer* involved criteria used by the FCC to determine which applicants could participate in the lottery process.

98. 15 U.S.C. § 4242(b)(2) (Supp. III 1985).

99. RTNDA Statement, *supra* note 26, at 507. In response to these statements, NOAA explained when issuing the final regulation that under 15 U.S.C. § 4203(b), which defines the boundaries of nondiscriminatory access, a licensed organization can collect data from the system, screen it for newsworthy items, and publish the unenhanced data without violating the Act. It need not make all of its data publicly available—only those scenes it saves for its own actual use or sale. Also, in most cases, a news organization does not publish unenhanced data but must specifically process it to get imagery that will be meaningful to the public. This process constitutes a "value-added activity" and all that is required under section 4203(b) is that the unenhanced data be made available to all buyers at the time the image or other value-added product is published or as promptly as reasonably possible thereafter. 52 Fed. Reg. 25,966, 25,968–69 (1987). The text of the final regulation is found at 52 Fed. Reg. 25,973 (1987) (to be codified at 15 C.F.R. § 906.11).

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ment for any such legislation to be upheld is that it be nondiscriminatory. For example, the government may deny the right to deduct for federal taxation purposes money spent by the media on lobbying activities,[100] but it cannot impose discriminatory taxes on the dissemination of the news.[101]The media is also subject to nondiscriminatory application of the National Labor Relations Act[102] and the Fair Labor Standards Act.[103] In cases involving these statutes, the standard the Court employed was whether they affected the impartial distribution of the news, and the Court held that they did not.

As already discussed,[104] in the prison access cases the Supreme Court indicated that the press had no greater right of access to prison inmates than do members of the general public. Those cases, read in conjunction with the economic regulation cases, seem to indicate that courts would uphold an evenhanded system in which media and non-media entities were allowed to compete on an equal basis either to launch their own private satellites or to utilize government civilian satellites on a space-available basis.

C. *Preferential Treatment*

It can be argued, however, that singling out selected media applicants over others constitutes impermissible government favoritism of certain ideas at the expense of others which are equally worthy. This is the reasoning, for example, behind the refusal of the Small Business Administration (SBA) to provide financial assistance to so-called "opinion molder" entities, defined as "[c]oncerns engaged in the creation, origination, expression, dissemination, propagation, or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of

100. Cammarano v. United States, 358 U.S. 498 (1959).

101. Grosjean v. American Press Co., 297 U.S. 233 (1936) (invalidating state statute which, in addition to other taxes of general applicability, imposed a tax of 2% on the gross advertising receipts of those newspapers having a circulation of more than 20,000 copies per week—the only papers in the state which opposed Governor Huey Long's policies). *See also* Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987); Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

102. Associated Press v. NLRB, 301 U.S. 103 (1937).

103. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

104. *Supra* notes 35–44 and accompanying text.

medium, form or content."[105] The regulation explains the ban as follows: "Financial assistance to such applications is barred in order to avoid Government interference, or the appearance of such interference, with the constitutionally protected freedom of speech and press."

The SBA regulation includes certain exceptions to the general ban. Among the entities falling outside the ban are the following: commercial or job printing firms; firms engaged solely in the reproduction of other materials; and general book or music (record) stores. Arguably, such fine distinctions could be challenged on vagueness or equal protection grounds.[106] Moreover, a federal district court recently held that the regulation unconstitutionally denied a dinner theater the right to engage in constitutionally protected speech.[107] These same concerns could conceivably arise in the Landsat context.

If the SBA or NOAA attempted to impose form and/or content requirements on the media entities to which it provides assistance, or as a standard for determining which applicants receive assistance, they would clearly violate the First Amendment and it is unlikely that any such requirement would be seriously considered. However, it can be argued that, no matter how carefully those judging applications might attempt to be neutral, they might subconsciously be inclined to favor certain applicants over others. For example, "middle of the road" publications might subconsciously be viewed more favorably than those espousing "extremist" viewpoints. If this could in fact be demonstrated—a difficult accomplishment—the unsuccessful applicant who was denied funding on the basis of content could presumably challenge the denial on this ground in court. An equally troublesome situation could arise if a media applicant sought to shade its speech content, or at least its application, in such a way

105. 13 C.F.R. § 120.101-2(b) (1987).

106. *Compare, e.g.*, 81 SBA Op. Dig. 155 (1971) (little theater group which produces and performs plays is ineligible for assistance) *with* 92 SBA Op. Dig. 103 (1974) (group which leases a theater building to showcase musical talent, cultural programs, community art groups, and art workshops is eligible for assistance). These and other such minor distinctions are compiled in Note, *Revision of the SBA Opinion Molder Rule*, 19 SAN DIEGO L. REV. 801, 808–18 (1982).

107. Mission Trace Investments v. Small Bus. Admin., Civ. No. 83-C-1982 (D. Colo. 1985).

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as to, in its view, enhance the possibility of obtaining the desired assistance.

Obviously, it is difficult to judge the validity of these arguments. Any such action would be difficult to document, and without such documentation, equally difficult to challenge. In the Landsat context, a showing by the Department of Commerce that it was inclined to license a wide range of media entities could in time make these arguments obsolete. On the other hand, the program could possibly be challenged if it appeared that a disproportionate number of licenses had been granted to those advocating particular viewpoints. Again, these arguments are more likely to arise in the context of allocating available space on civilian land remote-sensing satellites than in licensing those who wished to launch their own satellite systems, since—at least at the moment, and perhaps always if substantial government assistance is not provided—that option is reserved to the major networks or others with comparable resources.

CONCLUSION

Except in extraordinary circumstances, it seems clear that courts would uphold the right of the media to operate and/or utilize land remote-sensing satellites, as well as to broadcast or print any information which was so obtained. Dicta in the *Pentagon Papers* case indicates that a prepublication restriction would be justified only to prevent direct, immediate, and irreparable damage to the United States and its citizens. However, that case also indicates that the media could subsequently be penalized for releasing information found to violate national security or other pertinent criminal statutes.

At first blush, the prison "right of access" cases cast some doubt on this reasoning. However, it does not seem that they can serve as the basis for a total prohibition on news gathering in the context of land remote-sensing technology. Outer space is substantially different from a prison (*i.e.*, it is freely accessible to the public), and the Landsat Act clearly states that access is to be made freely available to all parties except insofar as national security is affected. Also, in the absence of international agreements with nations such as France and Japan barring the United States's access to images produced in companies headquartered in other countries, there is apparently little the United States can do to prevent American media and others access to such images.[108]

Regardless of what standard eventually emerges as controlling in this situation, whether from the Supreme Court or elsewhere, it is likely that specific situations will continue to be decided on case-by-case bases. This will obviously slow down the review of all applications and will thereby force the media to remain in its current state of uncertainty as to whether to invest in satellite systems. In the absence of consensus, however, this result seems constitutionally mandated. A working relationship may eventually evolve with guidelines agreeable to both the media and the government. However, this occurrence is presently unlikely and may ultimately remain so if the tension between the media's interests and those of the Department of Defense remain high.

108. OTA MEMORANDUM, *supra* note 5, at 5–6.

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